In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 6106

CATHERINE TARVER, PETITIONER

v.

SIDNEY SMITH, SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of February 22, 1971, this Court invited the Solicitor General to express the views of the United States concerning this case.

The issue presented is whether petitioner has a right to an administrative hearing regarding allegedly derogatory materials contained in the files of a state welfare agency. The right to a statutory "fair hearing" in some circumstances is provided not only by the Washington statutes challenged on constitutional grounds below, but also by federal statutes and regulations governing all federally funded public assistance programs. We believe it likely that petitioner was

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entitled to a "fair hearing" under the federal statutes and regulations if they applied to her case at the time she made her demand. However, the facts do not show whether they do, and the application of these provisions of law was not made an issue in the state court proceedings. It follows that this issue is not properly before the Court. *Beck* v. *Washington,* 369 U.S. 541, 549–554. Since the Court has expressed a preference for avoiding constitutional questions in public welfare cases, *e.g., Dandridge* v. *Williams,* 397 U.S. 471, 475–476; *Rosado* v. *Wyman,* 397 U.S. 397, and even the constitutional question is not fully developed,[1] we believe that further review would be inappropriate.

1. Petitioner received public assistance under the federally funded Aid to Families with Dependent Children (AFDC) program for a period ending May 6, 1967, when she was hospitalized. The Seattle police then placed the children under the protection of the local juvenile court, and on May 8, that court transferred them to the Department of Public Assistance for care, maintenance and protection. Petitioner's AFDC ceased as soon as she entered the hospital. On June 22, after her release and at a time when the children were still in state custody, she applied for and received a state grant of general

[1] If the constitutional issue was properly presented below, it would not be of jurisdictional significance that the state supreme court wrote its opinion as if it had not been. *Wood* v. *Chesborough,* 228 U.S. 672, 676–680.

assistance. The state general assistance program is not a federally assisted program although, as in many states, it is administered by the same agencies and under many of the same statutes.

Shortly thereafter, in the course of proceedings to retain the children in state custody as wards of the juvenile court, a caseworker filed a report which reflects adversely on the manner in which petitioner had been caring for her children. The Department of Public Assistance retained a copy of the report in its files. On August 24, petitioner demanded a "fair hearing" on the report, alleging that it was false and asking that it be corrected. The request was denied, leading to this lawsuit to compel state authorities to grant such a hearing. In a separate action, on September 12, the juvenile court held a custody hearing at which petitioner prevailed and was found entitled to custody. A copy of that decision was filed in the same records that contain the challenged report. The record does not show whether petitioner and her children subsequently sought to qualify for AFDC or whether the report ever became part of the records or files which would be consulted or used in connection with any AFDC grant.

The Washington state statute, under which petitioner demanded a "fair hearing," is also the state provision for the hearing which is required by the federal statutes as a condition of the state's participation in the federally funded public assistance programs, such as AFDC. *E.g.*, 42 U.S.C. 602(a)(4). At

the time of her demand, however, she was receiving general assistance, which is not federally funded; there is no basis in this record for relating that demand to a federal program because of subsequent events. Moreover, petitioner's arguments in the state courts related solely to the construction of the statute as a matter of state law and to her federal constitutional claim of right to a hearing. She did not argue that the statute must be construed to conform with the federal statute and regulations. The federal question whether the federal statute and regulations require a different construction of the Washington statute than was given it by the court below is not presented in this case. *Beck* v. *Washington, supra.*

2. While the constitutional question was raised below, the statutory issue—if available on the facts of this case—should first be considered. This is particularly the case since, in the view of the Department of Health, Education, and Welfare, petitioner would have been entitled to the demanded hearing if federal principles governed. The Department's regulations require that provision be made for granting a fair hearing:

> * * * to any individual requesting a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, or *because he is aggrieved by any other agency action affecting receipt, suspension, reduction, or termination of such assistance or by agency policy as it affects his*

> *situation* [45 C.F.R. 205.10(a)(3), emphasis added].[2]

One may say, quite simply, that the report which petitioner challenges threatens receipt of AFDC payments by threatening to deprive petitioner of her children, on which her receipt of AFDC benefits depends. One of the federal requirements for a state plan for AFDC is that it must:

> (16) provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have [42 U.S.C. (Supp. IV) 602(a)(16)].

If any question were now to arise as to the suitability of the home for the children, the prior report might well have an effect on referral of the case to the courts and action by the courts, notwithstanding the 1967 decision of the Juvenile Court. Thus, the re-

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[2] This regulation was published in the Federal Register on February 13, 1971, 36 F.R. 3034, to be effective 60 days thereafter, *i.e.*, on April 14, 1971. While the regulation made changes in prior HEW requirements (e.g., added requirements to implement the decision in *Goldberg* v. *Kelly*, 397 U.S. 254), the quoted provision represents a continuation and clarification of provisions previously contained in the Handbook of the Public Assistance Administration.

port retains a constant potential effect on petitioner's custody of her children and thereby on her receipt of assistance.

Read broadly, as intended, moreover, the HEW regulation requires opportunity for fair hearing whenever an individual is aggrieved by agency policy as it affects his situation. Even if the caseworker's report did not affect petitioner's receipt of assistance, it would still touch on important personal interests. A report in the records of a public agency which concludes that petitioner should not have custody of her children is a grievous matter. Whether the agency should correct such a report, if false, involves agency policy as it affects petitioner's situation.[3]

In this aspect, the HEW regulation reflects a concern that individuals who must look to public assistance to meet their subsistence needs should be able to obtain a hearing on any agency action that affects them. The hearing opportunity operates as a safeguard against potentially dehumanizing aspects of the

[3] The HEW regulation is based primarily on 42 U.S.C. 602 (a)(4), under which a State AFDC plan must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to familie with dependent children is denied or is not acted upon with reasonable promptness." Further support is found in the Secretary's broad power, under 42 U.S.C. 1302, to make such rules and regulations, not inconsistent with the Act, as may be necessary to the efficient administration of the functions with which he is charged under the Act. In addition, under 42 U.S.C. 602(a)(5), a State plan must provide such methods of administration as are found by the Secretary to be necessary for the proper and efficient operation of the plan.

system. The hearing process becomes a mechanism whereby individuals can ventilate their complaints and can gain assurance that the program provides orderly and fair treatment. An opportunity for a hearing on the correctness of a report which recommends taking custody of children from their mother seems a rather elemental recognition of personal interests which transcends any burden thereby imposed on the program.

3. The constitutional issue which petitioner has raised cannot rest upon this beneficent statutory policy. While a constitutional right to a hearing in certain circumstances is established, *Goldberg* v. *Kelly*, 397 U.S. 254, it is doubtful that the constitutional right has the extent which the Department believes is required to satisfy statutory purposes. The constitutional claim may be broader than the welfare setting in which it arises here. Ordinarily, governmental agencies need not disclose their investigatory files, much less subject them to scrutiny or correction. See, *e.g.*, 5 U.S.C. (Supp. V) 552(b)(7) (Public Information Act); Fed.R. Crim.P. 32(c)(2) (presentence reports). While it cannot be denied that the issue is of more than passing significance, the question of what the Constitution requires may not be a simple one to resolve. On the one hand, there is the burden on the government if it must entertain collateral judicial inquiry into the validity of whatever information it may obtain for its files; on the other, there is the legitimate interest of individuals in avoiding

adverse consequences from governmental action based on faulty information. The issue, we suggest, is one which should be postponed to a case in which the necessity for deciding it is apparent, and the consequences to the individual are more certain than the record here establishes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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